

Lisa P. Jackson, Commissioner
New Jersey Department of Environmental Protection
P.O. Box 402
Trenton, NJ 08625-0402

Re: Lower Passaic River Study Area

Dear Commissioner Jackson:

Thank you for your letter of May 24, 2006. In response to the requests outlined in that letter, the U.S. Environmental Protection Agency ("EPA") will provide a limited opportunity for participation by the New Jersey Department of Environmental Protection ("NJDEP") in the negotiations with the Potentially Responsible Parties ("PRPs") concerning the ongoing study of the 17-mile stretch of the Lower Passaic River and its tributaries from Dundee Dam to Newark Bay ("Lower Passaic River Study Area" or "Site"), which is part of the Diamond Alkali Superfund Site. Further, I would propose to schedule an Executive Committee meeting in August, after our respective staffs have had the opportunity to evaluate the data necessary to make informed decisions relating to any potential early actions.

EPA Negotiations with PRPs

In regard to the negotiations with the PRP group, EPA notified you of the initial negotiations with the yet-unformed PRP group in September 2003. As required in Section 121(f)(1)(F) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9621(f)(1)(F), EPA identified the scope of the response action and provided an opportunity for the State to participate in those negotiations when EPA invited the State to the original meeting that culminated in the first Administrative Order on Consent with the PRPs on the funding of the Study. The scope of the Study has not changed since that time.

At this juncture, the discussions between EPA and the PRPs relate not to a change of the scope of the Study, but to whether the PRPs may assume responsibility for some of the work under the Study. While EPA did not send a formal notice to the State of these most recent meetings, personnel from NJDEP have been aware of these discussions for several months through updates at project-related technical meetings that NJDEP attends. Further, with the issuance of the NJDEP Directive in December 2005 focused on dredging a portion of the River, it appeared that NJDEP was heading in a different direction in its efforts in the Passaic River than EPA and its partner agencies are in the Lower Passaic River Study.

However, EPA will offer an opportunity to NJDEP to provide input into the remaining negotiations. Because the State of New Jersey is in litigation with one of the parties represented by the PRPs relating to the Passaic River and its environs, there is a question as to the level of State participation that is appropriate. EPA proposes that EPA technical and legal staff provide formal updates to their counterparts in NJDEP and the Department of Law, to keep the State apprised of the negotiations, but it would be inappropriate to invite State personnel into the discussions because of the pending, corollary suit. Documents that are transmitted between the PRPs and EPA can be made available if the State is willing to sign a confidentiality agreement as to those documents. My staff will be contacting their counterparts to initiate this exchange.

In regard to your second point, we agree that an Executive Committee meeting is an appropriate forum to discuss a potential early action on the River, including the possibility of developing an Interim Remedial Measure ("IRM") that might be performed in the Lower Passaic River Study Area. As I mentioned above, however, I believe that such a meeting would be most fruitful if the EPA and NJDEP technical staffs have had an opportunity to review the most recent relevant data. The data presentations will not be available until mid-July. Consequently, a reasonable schedule for a meaningful status meeting would be no sooner than early August. I will have my staff begin the coordination to schedule a meeting in that time frame.

Also before we meet, I think it would be helpful to review with you the legal authority under which EPA will make and implement any cleanup decisions at the Site, so that the extent of and limitations on EPA's authority may be clearly understood by all. I hope this will contribute to continuing productive dialogue between EPA and NJDEP.

Legal Basis for EPA's Authority to Take An Early Action At the Site

As you know, EPA's authority to undertake a cleanup action at the Site arises under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), and its implementing regulations, the National Contingency Plan ("NCP"). By following the requirements of CERCLA and the NCP, EPA establishes that neither the public, nor the parties that EPA may require to perform the response actions, are subject to arbitrary government action.

CERCLA authorizes EPA to perform a "response action," which may be either a "removal action" or, since the Diamond Alkali Site is a National Priorities List ("NPL") site, a "remedial action." Prior to taking action under CERCLA, it is fundamental that EPA must evaluate and determine whether, and what kind of, response action is appropriate for the identified release or threatened release of a hazardous substance, pollutant or contaminant. In doing so, EPA must document the basis for the selection of the response action by establishing an administrative record that contains the documents that form the basis for the selection of the response action.

As explained below, there are three types of response actions that CERCLA and the NCP authorize at the Site prior to the final remedy being selected: 1) an IRM; 2) a removal action; or

3) a PRP-lead action. All of these options have certain legal requirements that must be met.

1. Process for Selecting an IRM at the Site

Ex. 5, predecisional & deliberative; attorney-client communication

in certain circumstances during scoping or at other points in the RI/FS process, EPA, as lead agency, may find that an IRM is appropriate. An IRM would be more limited in scope than a full remedial action, and would be designed to address only areas or media that would also be addressed by the final ROD at the Site. An IRM could be justified if EPA deemed that temporary action were necessary to stabilize the Site or a portion of the Site, prevent further environmental degradation, or achieve significant risk reduction quickly while a final remedial action is being developed.

At the same time, an IRM is by definition a remedial action, so any IRM performed at the Site would have to be developed following the requirements for an NPL Site set forth in the NCP, though these could be somewhat abbreviated. If EPA determines, based on analysis of the data gathered and Site conditions, that an IRM is required early in the RI/FS process to mitigate immediate threats to human health and the environment, EPA may choose not to complete the formal RI/FS before taking an action. In that case, it would be necessary to prepare a Focused Feasibility Study (“FFS”) containing a summary of the Site data collected during field investigations, an analysis of remedial alternatives considered and rejected, and the basis for the evaluation. The FFS must then be followed by issuance of a proposed plan, a public comment period, and the preparation of a Record of Decision (“ROD”) including a responsiveness summary addressing comments received.

2. Process for Selecting a Removal Action at the Site

Alternatively, EPA could decide to undertake or require a removal action at the Site if conditions were found to meet the necessary criteria. A decision that a removal action is appropriate at the Site while the RI/FS process is underway would require a finding that a threat to public health or the environment is posed by Site conditions, based on the criteria for a removal action found in the NCP. For either a time-critical or non-time-critical removal, EPA must make a formal determination that a removal action is appropriate, prepare an Action Memorandum, and establish an administrative record documenting the basis for the selection of the response action. In addition, for a non-time-critical removal action, EPA must prepare an engineering evaluation and cost analysis (“EE/CA”) to evaluate possible technologies, solicit public comment, respond to those comments, select a response action, and then prepare an Action Memorandum that documents Site conditions and EPA’s decision to respond to those conditions.

3. Process for a PRP-Lead Early Action at the Site

Ex. 5, predecisional & deliberative; attorney-client communication

Conclusion

Currently, EPA continues to evaluate the data that has been generated at the Site, in order to determine whether an interim action is appropriate and feasible. Whatever the results of this process may be, it will be in accordance with CERCLA and the NCP. Adhering to the established requirements will yield the best results for public health and the environment, as well as for our agencies. I look forward to further discussing this with you at the next Executive Committee meeting.

Sincerely,

Alan J. Steinberg
Regional Administrator